

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:CLE:TL-N-891-01
RSBloom

date: March 29, 2001

to: James Gutzwiller, Appeals Team Manager
Cincinnati, OH
Attn: Mary Jo Cook

from: Associate Area Counsel, LM:MCT:CLE

subject: Advisory Opinion: TEFRA Assessment
Partnership: [REDACTED]

(EIN: [REDACTED])

Partner: [REDACTED] (EIN: [REDACTED])

Years: [REDACTED], [REDACTED] and [REDACTED]

This memorandum supplements the advice previously provided by our office in memorandum dated February 26, 2001.

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the I.R.S. recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to I.R.S. personnel or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on the I.R.S. and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

Our memorandum dated February 26, 2001, concluded that it was best to provide notice to Parent as well as Partner, and we suggested certain recommended actions. After review of this memorandum by our National Office, an unresolved issue was raised.

(b)(5)(AC), (b)(7)a

(b)(5)(AC), (b)(7)a

(b)(5)(AC), (b)(7)a

Based upon the above concern, we recommend that you follow the first recommended action: mail parent copies of the notices of final partnership administrative adjustment. Do not, however, use the "Hillcrest" letter discussed during our earlier conversations. Although the "Hillcrest" letter is generally used when there has been a failure to provide timely notice, it is not appropriate in this instance. The "Hillcrest" letter, Exhibit 200-2 to IRM, Part VIII(Appeals), focuses primarily on the recipient's right to elect to treat partnership items as nonpartnership items.

(b)(5)(AC), (b)(7)a

Therefore, it is recommended that a letter be sent to the Parent enclosing copies of the FPAAs (with a statement attached to the FPAAs which names each corporation which was a member of the group during any part of the taxable period covered by the notice); the letter should merely state that: "A review of our records reveals that you were not provided a copy of the three notices of final partnership administrative adjustment referred to above. Therefore, copies are being enclosed herewith." The letter should not provide anything further regarding rights or options. This would clearly satisfy the statute in the event it was determined that notice was required to be given to the Parent.

Recommended action 2), as set forth in our previous memorandum, remains applicable and, if appropriate, should be followed.

(b)(5)(AC), (b)(7)a

(b)(5)(AC), (b)(7)a

(b)(5)(AC), (b)(7)a

If you have any questions concerning this matter, please feel free to contact the undersigned at 216-522-3380 (ext. 3108). Also, after you have prepared the proposed letter with enclosed copies of FPAAs, please feel free to forward it to our office for review.

JOSEPH F. MASELLI
Area Counsel
(Heavy Manufacturing, Construction
and Transportation)

By: _____
RICHARD S. BLOOM
Associate Area Counsel
(Large and Mid-Size Business)

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:CLE:TL-N-891-01

RSBloom

date: FEB 26 2001

to: James Gutzwiller, Appeals Team Manager
Cincinnati, OH

from: Associate Area Counsel, LM:MCT:CLE

subject: Advisory Opinion: TEFRA Assessment
Partnership: [REDACTED]

(EIN: [REDACTED])

Partner: [REDACTED] (EIN: [REDACTED])

Years: [REDACTED], [REDACTED] and [REDACTED]

This is in response to your memorandum dated January 23, 2001, wherein you requested our opinion on whether an assessment can be made against the above-named TEFRA partner. This memorandum is subject to 10-day post review by our National Office and, therefore, is subject to modification.

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and, if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

ISSUE

Whether the Service can presently make an assessment against the TEFRA partner for its tax liability based on adjustments contained in notices of final partnership administrative adjustment (FPAAs) when the partner's common parent was not provided copies of the FPAAs.

CONCLUSION

The Service cannot presently make the assessment against the partner; however, the statute of limitations for assessment against the partner has not expired. See the discussion below for recommended actions.

FACTS

[REDACTED] [hereinafter "Partner"] reported its income for the years [REDACTED], [REDACTED] and [REDACTED] as a member of a consolidated filing group of which [REDACTED] [hereinafter "Parent"] was parent. The address for both Partner and Parent is the same. During the years [REDACTED], [REDACTED] and [REDACTED], Partner was a [REDACTED] % partner in the partnership [REDACTED] [hereinafter "Partnership"]. [REDACTED] was the Partnership's tax matter partner [hereinafter "TMP"] and [REDACTED] % partner for each of the 3 years.

The Partnership filed its partnership returns, Forms 1065, for the years [REDACTED], [REDACTED] and [REDACTED] on October 10, [REDACTED], October 15, [REDACTED], and October 20, [REDACTED], respectively. Consents extending the time to assess tax, Forms 872-P, were timely executed by the TMP for the years [REDACTED] and [REDACTED], extending the period for assessment for both years to [REDACTED]. On [REDACTED], separate Notices of Final Partnership Administrative Adjustment [hereinafter "FPAAs"] were issued for each of the Partnership's years [REDACTED], [REDACTED] and [REDACTED]. The FPAAs were mailed to the TMP. Copies of the FPAAs were mailed to the Partner, but not to Parent. However, Partner as well as Parent had been mailed copies of both the NBAP (notice of beginning of administrative proceeding) and the 60-day letter.

On [REDACTED], (150 days after the mailing of the FPAAs) the successor in interest to TMP filed a complaint in the [REDACTED] (Case No. [REDACTED]) contesting the adjustments contained in the 3 FPAAs. This proceeding is on-going.

LEGAL ANALYSIS

I.R.C. § 6501(a) provides a general period of limitations for assessing and collecting any tax imposed by the Code. The section defines the period in relation to the filing of the return of the person liable for the tax. Section 6229(a) sets forth a minimum period for assessing any income tax with respect to any person that is attributed to any partnership item or affected item. This minimum period is defined in relation to the filing of the partnership return. This minimum period can be greater than, or less than, the period of limitations in section 6501. See Rhone-Poulenc Surfactants and Specialties v.

Commissioner, 114 T.C. 533 (2000).

Under section 6229(a)¹, the period of limitations on assessing a tax attributable to a partnership item shall not expire before the date which is 3 years after the later of the date the partnership return was filed or its due date (without regard to extensions). Based upon the filing dates, the assessment period would not expire before [REDACTED], [REDACTED], and [REDACTED], for the years [REDACTED], [REDACTED], and [REDACTED], respectively. However under section 6229(b), the period for assessment can be extended by agreement. Section 6229(b)(1)(B) allows the TMP to enter into an agreement in writing which extends the period for assessment with respect to all partners. Such agreements, Forms 872-P, were timely executed by the TMP and Commissioner for the years [REDACTED] and [REDACTED] extending the assessment period to [REDACTED], for both years. Accordingly, the period for assessing any tax with respect to any person which is attributable to any partnership item of the Partnership would not expire any earlier than [REDACTED], for the years [REDACTED] and [REDACTED] and [REDACTED], for the year [REDACTED].

I.R.C. § 6229(d) provides for the suspension of the running of the limitations period on assessment when a FPAA with respect to the taxable year is mailed to the TMP. On [REDACTED], FPAA's were mailed to the Partnership's TMP for each of the years [REDACTED], [REDACTED] and [REDACTED]. When a FPAA is issued, the running of the limitations period is suspended for the period during which an action may be brought under section 6226 (and, if a petition is filed under section 6226, until the decision of the court is final) and for 1 year thereafter. Under section 6226, the TMP may file a petition for a readjustment of partnership items with a court (Tax Court, District Court or Claims Court) within 90 days of the FPAA being mailed to it. Section 6226(a). Under section 6226(b), any notice partner may, within 60 days after the close of the 90 day period for the TMP to petition, file a readjustment petition from the FPAA provided the TMP had not filed within the 90-day period. Although the TMP did not file the petition within the 90 day period, it did file it within the 150 day period for notice partners. [REDACTED], was during the years covered in the FPAA's a [REDACTED] % partner in the partnership. Thus, in addition to being the TMP, it also qualified as a notice partner. I.R.C. § 6231(a)(8). As both the TMP and a notice partner, it could petition from the FPAA's under either subsection (a) or (b) of section 6226. Barbados #6 Ltd.

¹We are only analyzing the statute of limitations on assessment under section 6229 due to the fact that we have not been provided sufficient information regarding the individual taxpayer (e.g., filing dates of returns, extensions if executed).

v. Commissioner, 85 T.C. 900 (1985). Since the proceeding filed by the Partnership's TMP with regard to the FPAAs is on-going, the running of the period of limitations on assessing partnership items remains suspended.

Generally, no assessment of a deficiency attributable to any partnership item may be made before close of the 150th day after the day on which a FPAA was mailed to the TMP and, if a proceeding is timely brought in Tax Court, until such proceeding becomes final. I.R.C. § 6225(a). Since no proceeding was instituted from the FPAAs in the Tax Court, the restrictions on assessment ended after the close of the 150th day after the FPAAs were mailed to the TMP. Despite the restrictions on assessment being lifted, the assessment against the Partner cannot be made at this time.

I.R.C. § 6223(a) provides that each partner whose name and address is furnished to the Secretary shall be mailed a notice of both the beginning of an administrative proceeding and the final partnership administrative adjustment. In this case, the Partner and its Parent were provided notice of the beginning of the administrative proceeding, but only the Partner was provided notice of the final administrative adjustment. Since the Partner filed consolidated returns for the years covered by the FPAAs, the Service was required to provide the parent with notice of the final administrative adjustment. Section 6231(a)(2)(B) defines the term partner to include "any other person [other than a partner in the partnership] whose income tax liability under subtitle A is determined in whole or in part by taking into account directly or indirectly partnership items of the partnership. Since the parent corporation of the consolidated filing group files a return covering all members of the group, every member of the group will have its tax liability determined in part by taking into account partnership items of the subsidiary partner. Thus, every member of the consolidated filing group is a partner pursuant to section 6231(a)(2)(B). Under Treas. Reg. § 1.1502-77, all notices must be sent to the parent as the sole agent of the consolidated group.² At the time the FPAAs were issued, the Service was aware of the fact that the Partner was a subsidiary corporation which had filed consolidated returns with Parent for the years covered by the FPAAs. Under

²The common parent corporation and each subsidiary which was a member of the group during any part of the consolidated return year shall be severally liable for the tax due on the consolidated return. Treas. Reg. § 1.1502-6(a). Any notice of deficiency, in respect of the tax for a consolidated return year, will name each corporation which was a member of the group during any part of such period. Treas. Reg. § 1.1502-77(a).

these circumstances, it is best to provide notice to Parent as well as Partner.

I.R.C. § 6223(e) provides a partner with certain options if he was entitled to notice of the partnership proceeding but was not timely provided such notice. When the partnership proceeding is on-going, as in this case, the partner is provided the following 3 options under section 6223(e)(3):

- 1) Be a party to the on-going proceeding;
- 2) Have a settlement entered into by another partner of the partnership apply to him;³ or
- 3) Have the partnership items treated as nonpartnership items.

Temp. Reg. § 301.6223(e)-2T(c)(2) provides that the partner shall make the election, by filing a statement with the Internal Revenue Service office mailing the notice regarding the proceeding, within 45 days after the date on which the notice was mailed. In the written statement⁴, the partner may elect either option 2) or 3), above. If the partner does not file an election within the required time period, he is automatically a party to the on-going partnership proceeding. I.R.C. § 6223(e)(3).

In the event the partner timely elects either option 2) or 3), above, the partnership items with respect to the partner cease to be partnership items. I.R.C. § 6231(1)(b)(1)(D). Under section 6229(f)(1), the period for assessing any tax which is attributable to such items (or any item affected by such items) shall not expire before the date which is 1 year after the date which the items became nonpartnership items.

RECOMMENDED ACTIONS

1) You should mail Parent copies of the notices of final partnership administrative adjustment. As with notices of deficiency mailed to the parent of a consolidated group, the copies of the notices should have a statement attached which names each corporation which was a member of the group during any part of the taxable period covered by the notice.

2) If the Parent does not file the written election within 45 days after the date on which the notices are mailed (electing to treat the partnership items as nonpartnership items or electing to have applied to it a settlement entered into by

³Since the only other partner in Partnership petitioned from the FPAA's to the District Court, this option does not appear to be available to Partner.

⁴The required contents of the statement are set forth in Temp. Reg. § 301.6223(e)-2T(c)(3).

another partner), the deficiencies attributable to the partnership items as set forth in the FPAAs should be assessed against the consolidated group. In such case, Partner will be a party to the proceeding filed in district court regarding the FPAAs.

3) If the Parent within the 45 day period elects to have a settlement entered into by another partner and the Service apply to it,⁵ an agreement (e.g., Form 870) must be executed and the assessment based on the agreement must be made within 1 year from the filing of the election.

4) If the Parent within the 45 day period elects to have the partnership items treated as nonpartnership items, a notice of deficiency (asserting Partner's share of the adjustments contained in the FPAAs) must be issued to Parent within 1 year from the filing of the election (unless an agreement and assessment or a consent to extend the time to assess tax is entered into within the one-year time period).

If you have any questions concerning this matter, please feel free to contact the undersigned at 216-522-3380 (ext 3108).

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⁵See footnote 3., above.